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NEW DELHI, MONDAY, APRIL 13, 2009/CHAITRA 23, 1931

ELECTION COMMISSION OF INDIA NOTIFICATION

New Delhi, the 9th April, 2009

O.N. 83 (E).—In pursuance of Section 106 (b) of the Representation of the People Act, 1951 (43 of 1951), the Election Commission hereby publishes the judgment of the Supreme Court of India dated 19-3-2009 in Election Petition No. 7 of 2004.

IN THE SUPREME COURT OF INDIA CIVIL APPELLATE JURISDICTION CIVIL APPEAL NO. 1198 OF 2007

G. S. IqbalAppellant
Versus
K. M. Khadar & Ors.Respondents

JUDGEMENT

R. M. Lodha, J.

The unsuccessful election petitioner is in appeal aggrieved by the judgment dated March 28, 2006 of the Madras High Court whereby his election petition in challenging the election of respondent No. 2 has been dismissed.

2. The appellant (hereinafter referred, 'the petitioner') is an electorate of No. 7, Vellore Parliamentary Constituency, having electoral No. 555 in the electoral list. General Elections to constitute the 14th Lok Sabha took place in the months of April, May 2004. To represent the said constituency, 19 candidates contested election; K.M.

Khader Mohideen being one of them. The petitioner is the general secretary of Dravida Muslim Munnertra Kazhagam. This party supported AIADMK candidates in the 14th Parliamentary election in Tamil Nadu.

3. K. M. Khader Mohideen contested the 14th Lok Sabha elections, on the symbol of DMK party. The polling took place on May 10, 2004 and the results were declared on May 13, 2004. He was declared elected from No. 7, Vellore Parliamentary Constituency. We shall refer him hereinafter, 'returned candidate'.

4. The petitioner challenged the election of the returned candidate by filing election petition on the grounds set out in Section 100(1)(d)(i) and (iv) of the Representation of People Act, 1951 (for short, 'Act, 1951').

5. The petitioner set up the case that the returned candidate did not belong to the DMK party; that he falsely alleged at the time of filing. The nomination that he belonged to DMK party; that in fact the returned candidate belongs to Indian Union Muslim League party (IUML) and he is also the President of the Tamil Nadu Indian Union Muslim League (TNIUML); that IUML is a registered as well as recognized political party in the State of Kerala with a reserved symbol of "Ladder"; that the nomination of the returned candidate suffered from violation of Section 13 of the Election Symbols (Reservation and Allotment) Order, 1968 (for short, 'Symbols Order, 1968'), that the presentation of nomination paper by the returned candidate was not in accordance with law and rather was a clear violation of the provisions of the Act, 1951; that there was an improper acceptance of nomination of the returned candidate; that the entire electorate of the Vellore

constituency were misled and deceived by the returned candidate that he belonged to DMK party and because of the adoption of deceptive tactic and camouflage of the returned candidate that he belonged to DMK party which in fact he was not and, therefore, the result of the election in No. 7, Vellore constituency was materially affected. The petitioner, thus, prayed that the election of the returned candidate be declared void under Section 100 (1)(d)(i) and (iv) of the Act, 1951.

6. The returned candidate resisted the election petition and raised diverse pleas in the written statement : that the election petition was not maintainable and it lacked cause of action; that it does not allege violation of any specific provision of the Act, 1951 that the nomination filed by him on May 19, 2004 was objected to and the returning officer overruled the objection and held that nomination was in order; that he produced his membership card of the DMK party before the returning officer; that Forms A and B were filed at the time of nomination itself and there was no violation of Symbols Order, 1968; that his nomination was proper and did not suffer from any infirmity and rightly accepted by the returning officer and that there was no violation of any law or there was no violation or non-compliance with the provision of the Constitution or of the Act, 1951 or any rules or orders made under the Act, 1951.

7. In view of the pleadings of the parties; the designated Election Judge framed the following issues :

- (i) Whether the nomination filed by the second respondent is valid in law as prescribed under the Rules?
- (ii) Whether the acceptance of the nomination of the second respondent is proper and valid in the light of prescribed rules and regulations and the provisions of Representation of the People Act, 1951?
- (iii) Whether the presentation and acceptance of nomination of the second respondent has materially affected the result of the elections?

8. The designated Election Judge examined the returning officer as CW-1 and through whom Ex. C-1 to C-9 were marked. The petitioner examined the general secretary of Muslim League party as PW.1, the organisation secretary of DMK party as PW. 2 and examined himself as PW. 3. He also produced 19 documents marked Ex. P-1 to P-19. The returned candidate examined himself as RW.1 and produced 3 documents marked Ex. R-1 to R-3.

9. The designated Election Judge after hearing the parties, recorded his findings on all the three issues against the petitioner and, accordingly, dismissed the election petition.

10. Mr. A. Palaniappan, learned counsel for the petitioner strenuously urged that the returned candidate was not a valid member of DMK party on the date of filing of nomination papers as he continued to be member of Tamil Nadu Indian Union Muslim League which is State unit of Indian Union Muslim League. Learned counsel

would submit that the returned candidate was member of two political parties at the time of filing the nomination and, thus, the acceptance of his nomination was invalid being in violation of Section 100(1)(d)(iv) of the Act, 1951. He would submit that the returned candidate had violated the provisions of the Act, 1951 as well as Symbols Order, 1968. According to him Symbols Order, 1968 provides that a candidate set up by a party shall be a member of that party alone to use the symbol of that party but the returned candidate continued to sustain his claim that he was a member of DMK as well as IUML. The learned counsel contended that the fielding of returned candidate by the DMK was in contravention of Section 29A of the Act, 1951 as he belonged to another political party. The learned counsel would submit that the returned candidate continued to claim that he was a member of two political parties simultaneously which is inconsistent with the provisions of Tenth Schedule of the Constitution. The learned counsel submitted that the returned candidate hoodwinked the electorate by falsely alleging that he was a member of DMK party and stood in the Rising Sun symbol for which he was not legally entitled and thereby he had procured and obtained substantial votes by misleading the electorates and, therefore, his election was liable to be set aside.

11. On the other hand, Mr. M. Sundar, learned counsel for the returned candidate supported the view of the High Court.

12. Section 100 of the Act, 1951 sets out the grounds for declaring election void. It is now more than well settled that the grounds for declaring an election to be void must conform to the requirement of Section 100 of Act, 1951.

13. In the election petition, the petitioner sought declaration of the election of returned candidate to be void under Section 100(1)(d)(i) and (iv). The said provisions read thus :

"100. Grounds for declaring election to be void

- (1) Subject to the provisions of sub-section (2) if the High Court is of opinion —
 - (a)
 - (b)
 - (c)
 - (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—
 - (i) by the improper, acceptance or any nomination,
or
 - (ii)
 - (iii)
 - (iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

The High Court shall declare the election of the returned candidate to be void."

14. That the returned candidate contested the election in the 14th Parliamentary Elections for Vellore Parliamentary Constituency as a DMK candidate on its symbol is not in dispute. That DMK is a party registered with the Election Commission as a political party under Section 29A of the Act, 1951 is again not in dispute. That the returned candidate had produced his membership card of DMK party with the returning officer before the scrutiny of nomination papers is satisfactorily established on record. From the oral evidence of CW.1 as well as the documentary evidence produced by him (Ex. C-1 to C-9), it is seen that Forms A and B were in order and met the requirement of Symbols Order, 1968. After careful sifting the evidence of the returning officer (CW. 1) and the documentary evidence (Ex. C-1 to C-9), the designated Election Judge reached the conclusion that the nomination papers of the returned candidate were complete on the date of scrutiny and that there was no false declaration by him before him. The designated Election Judge also concluded that the returned candidate has not violated any of the provisions of the Symbols Order and there was absolutely no illegality, infirmity or impropriety in the acceptance of the nomination papers of the returned candidate. Having considered the matter thoughtfully, we find no justifiable reason to take a view different from that of designated Election Judge.

15. Tamil Nadu Indian Union Muslim League (TNIUML) was not registered political party in Tamil Nadu in so far as the 14th Lok Sabha Election is concerned within the meaning of the Act, 1951. This fact is established by perusal of the list of registered political parties published by the Tamil Nadu State Election Commission on 6-5-2004 (Ex.R-2) and the list of registered but unrecognized political parties in India published by the Election Commission of India on 27-09-2005 (Ex.R-3). Since it was not a registered political party within the meaning of the Act, 1951, admittedly no symbol was allotted to that party in that election. The petitioner relied upon Ex. P-18 which only pertained to Panchayat Election and rightly held to have no application to Assembly and Parliamentary elections. As a matter of fact the entire edifice built by the petitioner that returned candidate was a member of two political parties has no factual or legal foundation. From the material that has been placed on record, the designated Election Judge found that there was nothing to infer that the returned candidate was a member of two registered political parties on the date of nomination. We find no error in the finding recorded by him.

16. It was submitted on behalf of the petitioner that the returned candidate claimed that he became a member of the DMK party on April 1, 2004 but he did not resign from the primary membership of TNIUML before he joined the DMK and thus, there was a clear legal bar for the returned candidate to become a member of the DMK.

17. The submission of the learned counsel is misplaced as it assumes that TNIUML was a registered political party with the Election Commission for the purposes of the 14th Lok Sabha Election in Tamil Nadu.

We find that the material placed on record lacks cogent evidence in establishing TNIUML as a registered political party. The reliance placed by the learned counsel on Section 29A of the Act, 1951 is bereft of any substance. Moreover, as to whether the returned candidate as a member of TNIUML could have become member of another political party viz., DMK as per their bye-laws or *vice-versa* or not is not of any significance in view of the fact that it is the DMK party that nominated the returned candidate as its candidate on its party symbol for contesting the 14th Parliamentary Election from No.7 Vellore Parliamentary Constituency. Further it has come on record that in Tamil Nadu with regard to the 14th Lok Sabha General Elections, the political parties aligned themselves into two major poll formations : (i) DPA-headed by- DMK and (ii) NDA-headed by AIADMK. Thus, there was pre-poll alliance amongst various political parties. In so far as TNIUML is concerned, it aligned with DMK. It has come on record that there was unanimous resolution of the executive committee of TNIUML that the returned candidate would contest the 14th Lok Sabha General Elections from No.7, Vellore Constituency in the Rising Sun symbol of DMK party. In this view of the matter even otherwise there was no impediment for the returned candidate becoming the member of DMK party and contesting election from No.7, Vellore Parliamentary Constituency on the symbol of DMK.

18. Section 36 of the Act, 1951 deals with scrutiny of nomination papers by the returning officer. Section 36(2) which is relevant for the present purpose reads thus :

“(2) The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination and may, either on such objection or on his own motion, after such summary inquiry, if any, as he thinks necessary refuse any nomination on any of the following grounds :

- (a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the following provisions that may be applicable, namely :—

Articles 84, 102, 173 and 191

Part II of this Act, and Sections 4 and 14 of the Government of Union Territories Act, 1963 (20 of 1963); or

- (b) that there has been a failure to, comply with any of the provisions of Section 33 or Section 34;

OR

- (c) that the signature of the candidate, or the proposer on the nomination paper, is not genuine.”

19. What is really important is that on the date of the scrutiny of nomination, the candidate must, be qualified and must not for the election of Lok Sabha, have incurred disqualification under Articles 84 and 102 of the Constitution or there must not have been non-compliance with any of the provisions of Section 33 or 34 of the Act, 1951.

20. Sections 33 and 34 of the Act, 1951 provide thus :

“33. Presentation of nomination paper and requirements for a valid nomination—(1) On or before the date appointed under clause (a) of Section 30 each candidate shall, either in person or by his proposer, between the hours of eleven O'clock in the forenoon and three O'clock in the afternoon deliver to the returning officer at the place specified in this behalf in the notice issued under Section 31 a nomination paper completed in the prescribed form and signed by the candidate and by an elector of the constituency as proposer :

Provided that a candidate not set up by a recognized political party, shall not be deemed to be duly nominated for election from a constituency unless the nomination paper is subscribed by ten proposers being electors of the constituency :

(2) In a constituency where any seat is reserved, a candidate shall not be deemed to be qualified to be chosen to fill that seat unless his nomination paper contains a declaration by him specifying the particular caste or tribe of which he is, a member and the area in relation to which that caste or tribe is a Scheduled Caste or, as the case may be, a Schedule Tribe of the State.

(3) Where the candidate is a person who, having held any office referred to in Section 9 has been dismissed and a period of five years has not elapsed since the dismissal, such person shall not be deemed to be duly nominated as a candidate unless his nomination paper is accompanied by a certificate issued in the prescribed manner by the Election Commission to the effect that he has not been dismissed for corruption or disloyalty to the State.

(4) On the presentation of a nomination paper, the returning officer shall satisfy himself that the names and electoral roll numbers of the candidate and his proposer as entered in the nomination paper are the same as those entered in the electoral rolls :

Provided that no misnomer or inaccurate description or clerical, technical or printing error in regard to the name of the candidate or his proposer or any other person, or in regard to any place, mentioned in the electoral roll or the nomination paper and no clerical, technical or printing error in regard to the electoral roll numbers of any such person in the electoral roll or the nomination paper, shall affect the full operation of the electoral roll or the nomination paper with respect to such person or place in any case where the description in regard to the name of the person or place is such as to be commonly understood; and the returning officer shall permit any such misnomer or inaccurate description or clerical, technical or printing error to be corrected

and where necessary, direct that any such misnomer, inaccurate description, clerical, technical or printing error in the electoral or in the nomination paper shall be overlooked.

(5) Where the candidate is an elector of a different constituency, a copy of the electoral roll of that constituency or of the relevant part thereof or a certified copy of the relevant entries in such roll shall, unless it has been filed along with the nomination paper, be produced before the returning officer at the time of scrutiny.

(6) Nothing in this section shall prevent any candidate from being nominated by more than one nomination paper :

Provided that not more than four nomination papers shall be presented by or on behalf of any candidate or accepted by the returning officer for election in the same constituency.

(7) Notwithstanding anything contained in sub-section (6) or in any other provisions of this Act a person shall not be nominated as a candidate for election,—

(a) in the case of a general election to the House of the People (whether or not held simultaneously from all Parliamentary constituencies), from more than two Parliamentary constituencies;

34. Deposits.—(1) A candidate shall not be deemed to be duly nominated for election from a constituency unless he deposits or causes to be deposited,—

(a) in the case of an election from a Parliamentary constituency, a sum of ten thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of five thousand rupees; and

(b) in the case of an election from an Assembly or Council constituency, a sum of five thousand rupees or where the candidate is a member of a Scheduled Caste or Scheduled Tribe, a sum of two thousand five hundred rupees :

Provided that where a candidate has been nominated by more than one nomination paper for election in the same constituency, not more than one deposit shall be required of him under this sub-section.

(2) Any sum required to be deposited under sub-section (1) shall not be deemed to have been deposited under that sub-section unless at the time of delivery of the nomination paper [under sub-section (1) or, as the case may be, sub-section (1A) of Section 33] the candidate has either deposited or caused to be deposited that sum with the returning officer in cash or enclosed with the nomination paper

a receipt showing that the said sum has been deposited by him or on his behalf in the Reserve Bank of India or in a Government Treasury."

21. As a matter of fact, the petitioner neither specifically pleaded nor proved that there has been non-compliance with any of the Provisions of Section 33 or 34 of the Act, 1951. Thus, on the date fixed by returning officer for scrutiny of the nomination papers, there was no ground made out for rejection of nomination of the returned candidate under Section 36(2)(b) of the Act, 1951.

22. Article 84 of the Constitution makes the provision for qualification for membership of Parliament which reads thus :

"84. Qualification for membership of Parliament.—

A person shall not be qualified to be chosen to fill a seat in Parliament unless he—

- (a) is a citizen of India, and makes and subscribes before some person authorized in that behalf by the election Commission an oath or affirmation according to the form set out for the purpose in the Third Schedule;
- (b) is, in the case of a seat in the Council of States, not less than thirty years of age and, in the case of a seat in the House of the People, not less than twenty-five years of age; and
- (c) possesses such other qualifications as may be prescribed in that behalf by or under any law made by Parliament."

23. That the returned candidate meets the aforesaid qualification prescribed under the Constitution is not in dispute. Thus, it has to be held that the returned candidate possessed qualification for membership of Parliament.

24. Article 102 of the Constitution is as follows :

"102. Disqualifications for membership.—(1)

A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament—

- (a) if he holds any office of profit under the Government of India or the Government of any State, other than an office declared by Parliament by law not to disqualify its holder;
- (b) if he is of unsound mind and stands so declared by a competent court;
- (c) if he is an undischarged insolvent;
- (d) if he is not a citizen of India, or has voluntarily acquired the citizenship of a foreign State, or is under any acknowledgment of allegiance or adherence to a foreign State;
- (e) if he is so disqualified by or under any law made by Parliament.

(2) A person shall be disqualified for being a member of either House of Parliament if he is so disqualified under the Tenth Schedule."

25. There is not even whisper either in the election petition or the evidence let in by the petitioner that the returned candidate is disqualified under Article 102(1)(a) to (d) for being chosen as a Member of Lok Sabha. The learned counsel for the petitioner would contend that a person shall be disqualified under Article 102(1)(e) and (2) for being chosen as a Member of Parliament if he is so disqualified under the Tenth Schedule. He would also contend that since the returned candidate continued to be member of two political parties viz., DMK and TNUML even after his election, he has even otherwise incurred disqualification under the Tenth Schedule.

26. Tenth Schedule was added in the Constitution by the Constitution (52nd Amendment) Act, 1985 whereby the Provisions as to disqualification on the ground of defection have been made part of the Constitution itself.

27. Paragraph 2 of the Tenth Schedule, provides for disqualification on the ground of defection which is as follows :

"2. Disqualification on ground of defection.—

(1) Subject to the provisions of paragraphs 4 and 5, a member of a House belonging to any political party shall be disqualified for being a member of the House—

- (a) if he has voluntarily gives up his membership of such political party; or
- (b) if he votes or abstains from voting in such House contrary to any direction issued by the political party to which he belongs or by any person or authority authorized by it in this behalf, without obtaining, in either case, the prior permission of such political party, person or authority and such voting or abstention has not been condoned by such political party, person or authority within fifteen days from the date of such voting or abstention."

28. Paragraph 6 of the Tenth Schedule provides for adjudicatory machinery for determination of the questions of disqualification on the ground of defection. It is thus:

"6. Decision on questions as to disqualification on ground of defection.—(1)

If any question arises as to whether a member of a House has become subject to disqualification under this Schedule, the question shall be referred for the decision of the Chairman or, as the case may be, the Speaker of such House and his decision shall be final :

Provided that where the question which has arisen is as to whether the Chairman or the Speaker of a House has become subject to such disqualification, the question shall be referred for the decision of such member of the House as the House may elect in this behalf and his decision shall be final.

(2) All proceedings under sub-paragraph (1) of this paragraph in relation to any question as to disqualification of a member of a House under this Schedule shall be deemed to be proceedings in

Parliament within the meaning of Article 122 or, as the case may be proceedings in the Legislature of a State within the meaning of Article 212."

29. The Speaker of the House is, accordingly, a competent statutory authority to decide the question as to whether the member of a House has become subject to disqualification under Tenth Schedule. The question relating to disqualification under Tenth Schedule has to be decided by the Speaker and none else. The decision of the Speaker in this regard is final, however, subject to judicial review on the permissible grounds. In any view of the matter such an issue cannot be a subject-matter for consideration in an election petition under the Act, 1951. The submission is more in desperation than in substance and it is rejected accordingly.

30. In our view, the designated Election Judge did not commit any error in observing that in order to make out a case under Section 100(1)(d)(iv), it was necessary for the petitioner to specifically plead that the election in so far as it concerned the returned candidate has been materially affected by the non-compliance of the provisions of the Act, 1951 or the rules made thereunder. The designated Election Judge held that the entire electioneering in

Tamil Nadu in the 14th Lok Sabha was done by the two major pre-poll formations and hence, it cannot be stated that it was not made known to the public that to which alignment a particular party and movement belonged and, therefore, there was no confusion in the mind of electorates. It was noticed that margin between the returned candidate and the defeated candidate was 1,78,610 and hence, it cannot be said that the result of the returned candidate has been materially affected by the non-compliance of the Provisions of the Act, 1951. We agree with the view of the designated Election Judge.

31. In the result, the appeal fails and is dismissed with costs. Costs quantified at Rs. 25,000.

Sd/-

(D. K. JAIN)

New Delhi

March 19, 2009

Sd/-

(R. M. LODHA)

[No. 82/TN-HP/7/2004]

By Order,

TAPAS KUMAR, Principal Secy.